(2)

Supreme Court, U.S.
FILED
SEP 3 2002
CLERK

01-1649

No.

In the

Supreme Court of the United States

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA
Petitioner,

v.

BILLY JOE LANDRUM,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

THOMAS TUCKER BUCHANAN
Counsel of Record
531 North 5th Avenue
P.O. Box 4326
Laurel, Mississippi 39441

Counsel for Respondent

16 pp

TABLE OF CONTENTS

Table of Contents	i
Table of Cited Authorities	ii
Introduction	1
Statement of the Case	2
Reasons for Denying the Writ	6
Conclusion	13

TABLE OF CITED AUTHORITIES

Page

Cases:

Buckley v. Valeo, 424 U.S. 1 (1976) 10

Golden v. Zwickler, 394 U.S. 103, 109 (1969) 8

Jefferson v. City of Tarrant, Alabama, 522 U.S. 75, 81 (1997) 6

Norman v. Reed, 502 U.S. 279, 288 (1992) 8

Oil Workers Unions v. Missouri, 361 U.S. 363, 368-369, 371 (1960) 8

Weinstein v. Bradford, 423 U.S. 147, 149 (1975) 8

Statutes:

28 U.S.C. § 1257 1,6

INTRODUCTION

Although the petition purports to present a question of some importance as to the circumstances in which a court is permitted by the First Amendment to enjoin the massive expenditure of money designed to affect the outcome of a state election in violation of state law, this case is not an appropriate one to decide that question for a series of interrelated reasons. First, the appeal is from a decision of a state court, and there is no final judgment in the case as required by 28 U.S.C. § 1257. Second, the injunction from which the appeal arises has been dissolved, and there is no reasonable likelihood that a similar dispute will arise involving these parties that would prevent the case from being moot. Third, the substantive legal issues raised by the injunction are now pending before this Court in a petition for writ of certiorari by the State of Mississippi in response to the denial by the 5th Circuit Court of Appeals for a rehearing en banc, and are likely to be resolved in a way that will make it clear either that petitioner can or cannot make the kind of expenditures at issue in this case, and so the case is also unlikely to arise again with any other party besides this respondent.

Fourth, the factual record in this case is extremely sparse, and hence this Court would be deciding the prior restraint question in an almost hypothetical manner. Fifth, the procedural posture of this case as the third of four cases in which temporary restraining orders were granted shortly before an election, and then traveled different appellate paths before the orders were dissolved, makes this a particularly inappropriate vehicle for passing on the questions presented. To the extent that the Court believes that the petition presents recurring issues of importance, they can be dealt with much more appropriately in another case where the myriad problems involved here are absent.

STATEMENT OF THE CASE

In general, the petition contains most of the facts necessary for the Court to decide whether to grant review. However, the presentation tends to gloss over those aspects of the record that point out why review is inappropriate. Accordingly, respondent will briefly summarize the relevant facts and proceedings.

The petitioner Chamber of Commerce of the United States began running frequent television advertisements in favor of certain Mississippi Supreme Court candidates on or about October 17, 2000, three weeks before the election for each of the four seats

on the Court that were being contested. Six days later, the Chamber filed a declaratory judgment action against the State of Mississippi and certain state officials in the United States District Court for the Southern District of Mississippi. After an expedited hearing requested by the Chamber, that Court ruled on Thursday, November 2, five days before the election, that the Chamber's advertisements were not immune on First Amendment grounds from Mississippi's campaign finance laws.

The following day, November 3, the Hon. Frank Vollor, who was the opponent of Justice Jim Smith, sought and obtained a temporary restraining order in the Chancery Court of Hinds County, Mississippi, to prohibit the Chamber from running further advertisements in support of Justice Smith in violation of Mississippi law. The next day, November 4, a similar TRO was issued by the Chancery Court of Harrison County, at the request of Justice Oliver Diaz, who was running against the Hon. Keith Starrett (supported by the Chamber), and the respondent, the Hon. Billy Joe Landrum. On the following day, November 5, a similar TRO was sought by respondent and granted by the Chancery Court of Jones County in that same election. That order stated that, because of insufficient time, it was being granted without notice to

the Chamber. And on November 6, a further TRO was issued against the Chamber at the behest of a Mississippi citizen who claimed that his rights were being infringed by the Chamber's illegal expenditures. All of these TROs, including the one that is the subject of this petition, were stayed on November 6 by Justice Scalia, and the Chamber resumed broadcasting them and continued to do so through the November 21st runoff election.

This petition challenges the legality of one of the four TROs granted by the Mississippi Chancery Court – that issued against respondent Landrum. When this case was filed, respondent was a candidate for the Mississippi Supreme Court, but he lost in that election, and that election is over. Respondent is now, and has been for 16 years a Circuit Court judge in Mississippi and for 12 years before that he was a county judge. He is now 69 years of age, and he has authorized counsel to represent to this Court that he is highly unlikely to seek election to any other court (he is unopposed in his Circuit Court race for re-election this year).

Despite the obvious problems of mootness, petitioner appealed the legality of the stayed and now dissolved TRO for a since completed election to the Mississippi Supreme Court, which rejected the appeal because the Chamber chose to by-pass the

Mississippi Supreme Court and proceed directly to this Court. The Mississippi Supreme Court did not dismiss the case entirely or affirm the judgment below. Instead, it remanded for further proceedings consistent with its ruling. Respondent then moved to file an amended complaint, eliminating his claim for injunctive relief, and in its place, seeking money damages against the Chamber for the harm it caused him through its illegal campaign expenditures and related unlawful activities.

Then, seventeen months after the case was brought, the Chamber tardily removed the case to federal court on diversity of citizenship grounds. Although respondent was prepared to move to remand, the district court immediately stayed all proceedings (including any motions to remand), pending the outcome of the petition for certiorari and the proceedings in the Fifth Circuit described in the petition and discussed below.

Throughout this case and the related ones, the Chamber has contended that it had not violated Mississippi law because it had not engaged in express advocacy as a matter of Mississippi law and because, in any event, the First Amendment permits it to spend money for the kind of advertisements that it was making, even if state law prohibits it. The petition is quite adamant in disclaiming

any desire to have those issues resolved in this case because they are the subject of the Chamber's own lawsuit in federal court. Indeed, it has prevailed before a panel of the Fifth Circuit, and the petition for rehearing by the Mississippi Attorney General and others has been denied, but is on appeal to this Court by a petition for writ of certiorari. As the parties have recognized in agreeing to a stay of the removed claim in this case, the outcome of the Chamber's federal case will profoundly impact the remaining claim for damages.

But the Chamber's federal case is also important to this case because since it prevailed in the Fifth Circuit, and if it prevails in this Court, under either state or federal law, it will no longer have any need to fear any state court injunctions of the kind that were issued here, from respondent or from anyone else.

REASONS FOR DENYING THE WRIT

1. There is no final judgment in this case as required by 28 U.S.C. § 1257 and decisions of this Court such as *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75, 81 (1997). Although the issue of the TRO is no longer in the case, the case is not over because the Mississippi Supreme Court ordered a remand. Then,

on remand, respondent moved to amend his complaint, and the Chancery Court permitted him to do so. Petitioner then removed the amended complaint to the federal court, relying on the same diversity of citizenship grounds that have always existed (assuming the Chamber does not claim that the value of the original controversy over its massive television advertisement campaign was less than $75,000).[1] Because there is a stay entered by the district court, respondent has not filed a motion to remand, but even if that motion should be denied, the case would still be pending in federal court. Whether a certiorari petition from a federal district court to this Court might have any basis in any case (and none has been filed in this one), there would be no extraordinary reason for this Court to accept an interlocutory review from a district court where there is no injunction pending and none ever likely to be granted in this case.

2. Even if there were a final judgment, the claim for injunctive relief in this case is clearly moot as between these parties. As noted above, it is highly unlikely that respondent will seek election as a Justice of the Mississippi Supreme Court again,

---

[1] See "Debate Over Tort Reform Ongoing", *The Clarion-Ledger*, June 19, 2001, pp 1a, 4a (reporting that Chamber spent $958,000 on Mississippi Supreme Court elections).

given his age and his status as a sitting judge. He is currently running unopposed for Circuit Court judge, and there is no claim by the Chamber that it will make any expenditures against him in that race that might conceivably cause him to seek injunctive relief of the kind that he sought here. Therefore, he has no current stake in the debate over the legality of the TRO, and hence there is no Article III case or controversy over it. Any claim by the Chamber that it will suffer future harm is "wholly conjectural." *Golden v. Zwickler*, 394 U.S. 103, 109 (1969). *See also, Oil Workers Unions v. Missouri*, 361 U.S. 363, 368-369, 371 (1960) (where an allegedly unconstitutional injunction against a labor strike had expired by its own terms, the case was moot despite the possibility of future injunctions against the labor unions that were involved). As a practical matter, there is "no reasonable expectation that the same complaining party [will] be subjected to the same action again," *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975), and certainly not at the hands of the appellee here. *Cf. Norman v. Reed*, 502 U.S. 279, 288 (1992) (case not moot because "[t]here would be every reason to expect *the same parties* to generate a similar, future controversy").

There is another reason why, even if the Chamber expected to run similar ads against some other judicial candidate in the future, there is no reasonable likelihood that a case remotely similar to this one would arise. The principal substantive issue on which the parties differed in all four TRO cases is whether, as a matter first of state law and then of First Amendment law, Mississippi could forbid the Chamber from running the kind of ads that it ran in connection with the 2000 elections for Justices of the Mississippi Supreme Court. Those issues are now before this Court by Mississippi's appeal of the Fifth Circuit's denial of the petition for rehearing en banc, and perhaps this Court will resolve them in a way that everyone will know whether the Chamber can or can not run similar ads in the future. As it stands currently, the Fifth Circuit has found in favor of the Chamber. But whatever the answer, everyone will comply with the law, and there will be no similar lawsuit to this one, further underscoring why this case is moot.

3. Respondent does not disagree that the standard for enjoining political speech places a very heavy burden on the party seeking the injunction because of this Court's prior restraint rulings. Respondent also recognizes that expenditures related to

elections are entitled to First Amendment protection, consistent with this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), and the cases that have followed it. But that does not neuter every court from the power to enjoin the expenditure of money for election related purposes, simply because the party seeking to make the expenditure claimed First Amendment status for it.

For example, suppose in this case the Chamber (or a non-U.S. corporation) had sought to run ads that clearly constituted express advocacy, either because it did not fear criminal prosecution or was willing to pay the fine as a cost of obtaining a Mississippi Supreme Court to its liking. Assume further that under state law, once an election is concluded, the courts would have no power to overturn it, even where the claim was that massive illegal expenditures resulted in a very close victory for one candidate over another. A candidate seeking an injunction in such a situation would bear a heavy burden, but there is no decision of this Court that would clearly and absolutely foreclose the possibility of such relief, and indeed even the petition recognized (18-19) that the law against prior restraints is not absolute.

Yet the petition asks this Court to rule on the scope of the prior restraint doctrine in a context totally devoid of facts (because

the case came up on a TRO) and in which the key legal issues noted above are currently unresolved, but will be resolved in the near future. Thus, as presented, the prior restraint question in the petition is wholly abstract and hypothetical, as the phrasing of petitioner's own first question confirms. Even apart from the lack of finality and mootness, the prior restraint question posed by petitioner lacks the concreteness that should exist before the Court undertakes to decide such an important constitutional issue. Moreover, the facts of this case – which is the third of four similar ones in which TROs were granted and then stayed by this Court – are surely sufficiently unique as to make this a particularly poor vehicle for sorting out the complex legal issues in this area.[2]

4. The petition presents a second question – whether the Mississippi Supreme Court's decision that petitioner had waived its right to appeal violates its constitutional rights does not provide a basis for review either. In part, because of the unique procedural posture of this case, in which the Chamber deliberately by-passed

---

[2] Even if the Court were to consider the propriety of the TRO here, it might never reach the prior restraint issue because the TRO was issued without notice to Chamber and hence may have violated due process. *See Carroll v. Princess Anne*, 393 U.S. 175, 180 (1968) (reversing injunction for lack of notice and declining to address the "thorny problem" of whether it was justified under the facts).

the Mississippi Supreme Court in seeking a stay, the ruling below may well be applicable only to the Chamber in this case, but not in cases where it sought and was denied a stay in the Mississippi Supreme Court. In that circumstance, the decision may well constitute an adequate state ground for decision, and hence review in this Court would not be proper.

In any event, the second question has no independent leg on which to stand; it does not claim any legal right, but is offered essentially as a response to an anticipated defense. Thus, if it had any merit, it would do no more than remove a barrier to review by this Court and would not be an independent reason to grant the petition. Therefore, assuming that it too is not moot, it provides no reason for this Court to grant review.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

Thomas Tucker Buchanan
P.O. Box 4326
Laurel, Mississippi 39441-4326
(601) 649.8000

Attorney for Respondent,
Honorable Billy Joe Landrum